UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CARAVAN KNIGHT FACILITIES MANAGEMENT, LLC

Respondent Employer

and Case 07-CA-081195

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 1700

Respondent Unions

and Case 07-CB-082391

ARETHA A. POWELL, an Individual

Charging Party

_____/

RESPONDENT, CARAVAN KNIGHT FACILITIES MANAGEMENT, INC'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. SUMMARY OF ARGUMENTS

On April 3, 2013, Administrative Law Judge Michael A. Rosas issued his decision and dismissed the Complaint in this matter in its entirety. On May 31, Counsel for the Acting General Counsel ("CAGC") filed a number of exceptions to the ALJ's Decision. This Answering Brief is filed pursuant to Section 102.46 of the Board's Rules and Regulations and in opposition to CAGC's Exceptions.[1] As will become evident, the Board should affirm the ALJ Decision and Order as it is well supported by the evidence on the record. Indeed, the record evidence supports the ALJ's findings and conclusions that there was no violation of Sections 8(a)(1) and (3) of the Act. As such, CAGC's Exceptions should be denied in their entirety.

The ALJ correctly found and concluded that Respondent did not retaliate against Charging Party due to any protected concerted activity (e.g. her communications about the posting of the overtime list). The credible evidence established that nobody in general (and Powell in particular) cared whether the overtime list was posted or not. The credible evidence further established that Powell did not want to work overtime and that she worked very little overtime although she misrepresented this fact to the Board. Significantly, Powell revealed that she was able to avoid overtime work and body wash assignments when the overtime list was not posted and this is precisely why she did not push the issue. Of course, this explains why the ALJ was perplexed by Powell's testimony and explains why Powell retreated from and contradicted her earlier testimony about the posting: It simply made no sense! With this testimony, it is no

[1] Associate Executive Secretary Henry S. Breiteneicher granted a partial extension of time to file answering briefs on June 6 and extended the response date until July 15,2013.

wonder that the ALJ was unable to conclude that there was any causal connection between the protected activity and any adverse action by Respondent.[2]

The ALJ also correctly found that Respondent did not discriminate against Charging Party, Aretha Powell ("Powell"), when it changed her daily work assignments, assigned her to the body wash, reprimanded her in connection with a morning safety meeting, and suspended and discharged her for an alleged threat. The record evidence demonstrated in convincing fashion that there were legitimate, non-discriminatory reasons for each of these decisions. The ALJ properly considered the credible evidence and afforded it proper weight in his decision.

Indeed, Powell was assigned to work in the body wash area due to an increase in Chrysler's work load, which increased the need for employees to work in the body wash area. The unrebutted evidence also established that Powell had the second lowest overtime hours and under the mandatory overtime language of the labor agreement, Powell was unable to avoid the overtime work. Finally, contrary to what CAGC suggests, there is simply no evidence that Powell's work duties essentially doubled. At best, the evidence established that she performed similar duties in a different location of the plant. Nevertheless, the law is clear that any alleged changes in duties did not constitute adverse employment action.

Regardless of how CAGC characterizes Powell's behavior at the morning safety meeting, the record evidence established that Powell was the only employee who was not paying attention and who did not know the safety tip of the day when questioned by

[2] Contrary to the Complaint and CAGC's theory of the case, Powell testified that she did not want the OT Equalization List posted, but that she had said it was *supposed* to be posted (TR 281, 435-436).

management at the conclusion of the meeting. This much stands unrebutted on the record and resulted in her write-up.

As for Powell's suspension and discharge, the ALJ determined that CAGC did not establish that Respondent violated Section 8(a)(3) by firing Powell due to an *unlawfully* discriminatory purpose (emphasis in original). In this respect, The ALJ found that Respondent's Manager, Shoun Walle's problems with Powell were in no way related to her protected concerted activities. There was ample record evidence that nobody cared whether the overtime list was posted and that Walle was aware of and already had issues with Powell's attitude and personal demeanor, which led to his decision.[3] The record evidence of Powell's prior problems was abundant and corroborated by company and union witnesses alike and by Powell herself. Moreover, the ALJ found Tanner's testimony about the threat to be "more credible than the tentative and inconsistent testimony of Powell" (ALJD P 8, FN 34).

Finally, CAGC suggests the ALJ erred in finding that Respondent coercively interrogated an employee witness. In this respect, CAGC contends that the interrogation was hostile. No reasonable interpretation of the record evidence supports the suggestion by CAGC that Respondent conducted a hostile interrogation. The totality of circumstances demonstrates that the so-called interrogation was anything but coercive.

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[3] Although the ALJ found Walle's investigation to be flawed, this did not result in a finding that Powell had been retaliated against as the ALJ correctly observed that there was no causal connection between Powell's protected concerted activity and her discharge. Notwithstanding, the record evidence clearly established that Walle's investigation was not flawed. As such, Respondent has cross-excepted to this finding, but still asks that the ALJ's Decision and Order be affirmed.

The Decision and Order of the ALJ correctly finds and concludes that Respondent did not violate Sections 8(a)(1) or (3) of the Act with respect to Powell or any other employee. The Decision and Order is supported by the record as a whole. Accordingly, Respondent asks that CAGC's Exceptions be denied in their entirety and the Decision and Order be affirmed.[4]

II. ARGUMENT

A. Exception 1: The availability of other sources of information to view overtime hours.

The ALJ found that Powell conceded the availability of overtime work information in sources other than the posted list (ALJD P 3, FN 9). This finding is clearly supported by Powell's admission that overtime hours were on her pay stub and that she kept her pay stubs (TR 408-409). Powell's testimony is corroborated by the testimony of Marge Faircloth, the First Shift Union Steward, who confirmed that the hours showed up on employee pay stubs (TR 1084). The record evidence also established that employees also had access to their overtime hours on the computer, which any employee could review upon request (TR 146, 993, 1084). In fact, Faircloth had advised employees how to obtain their hours in this manner (TR 1084). The record evidence also established that employees could see their hours by simply asking a supervisor (TR 90).

CAGC's exception proceeds upon the faulty premise that the ALJ found Powell had access to other sources of information to view the unit employee's overtime equalization. The ALJ never found that she had access to other unit employees' hours,

[4] Respondent's Answering Brief shall not address in detail Acting General Counsel's Exceptions to the ALJ's findings and conclusions pertaining to the claim that the Union breached its duty of fair representation. Respondent will, however, join in the Union's Opposition to those Exceptions as unfounded and unsupported by the record as a whole.

and accordingly, CAGC's exception is misplaced. In this regard, the record evidence established that Powell, like all the other employees, had access to their own hours.

CAGC goes on to suggest that the computer tracking system and payroll stub information were not benefiting other unit members because it required knowledge that the systems existed, and could be used. CAGC's suggestion ignores the unrebutted testimony of Faircloth that she advised employees how to obtain their hours and that she received no complaints from anyone about the process (TR 1084-1085).

CAGC's other argument can easily be dispatched. Indeed, CAGC claims that the true beneficiary of the Respondent's failure to post the overtime hours, and the Union's complicity in that failure, was Union Chairman LeVaughn Davis. However, the record evidence is clear: Employees were not disadvantaged because the information was not posted (TR 980). In fact, the record evidence established that Powell and her co-worker, Marquita Harris, are the ones that actually benefited by not having the list posted. In this respect, Harris conceded that she and Powell did not want to work in the body wash area and were able to avoid that work as long as the overtime list was not posted (TR 617).

The record evidence established that employees could access their hours, but more importantly, that Powell was not interested in accessing her hours because as she admitted, "I didn't want to know. I wasn't doing overtime" (TR 357). Consequently, CAGC's exception should be overruled.

B. <u>Exception 2: Powell's payroll records concerning work on January 29 and April 7</u>.

CAGC excepts to the ALJ's assertion that the overtime list (GC 11) reflected that Powell worked two Saturdays, on January 28 and April 7, but that Powell's actual

payroll record (GC 25) did not indicate that she worked on either of those dates. In essence, the ALJ got it reversed as to which document shows Powell working on January 28 and April 7. While it is unclear what CAGC's point really is, this seems to be somewhat of an insignificant point, and in context, may have been mentioned by the ALJ as a point in reference to establish that Powell worked some overtime prior to her discussions about the overtime list on April 11, which is alleged to be protected concerted activity. In any event, the ALJ's mistake as to which exhibit actually showed Powell working overtime on January 28 and April 7 is of no consequence to the outcome of the case and is harmless error. *Allied Mechanical Services*, 346 NLRB 326, 328 (2006)(it is harmless error where sufficient evidence supports the judge's conclusion).

According to CAGC, "when viewing GC11 in its entirety, it is clear that Powell was the only employee who had not worked in the body wash prior to April 12 that was required to be retrained and work in the body wash after her complaint on April 1, and before her suspension on May 12" (CAGC Brief at p.4). CAGC's claim is absolutely unsupportable as Derrick Hamlet and Shantell Thomas both worked in the body wash area like Powell for the first time *after* April 1 (GC 11).[5]

Notwithstanding, it is an insurmountable problem for CAGC that the ALJ failed to find Powell was assigned to the body wash area in retaliation for her "complaints" about the list not being posted.

Of course, the ALJ's finding in this regard is well supported by the record. Significantly, Powell, herself, legitimized her body wash assignment:

Q. [By Robert Drzyzga] How'd the meeting end?

[5] The record established that Powell required refresher training because the job had changed since she last performed it while working on the third shift (TR 141). There was no evidence adduced at trial that any other employee had to be retrained.

A. [By Aretha Powell] So Margaret asked me maybe two, three times, she was like, 'Aretha, do you want the seniority list and the overtime lists posted?' and I replied, 'It's supposed to be posted.' So, it was maybe 10 minutes, five minutes before 8:00, so I asked Shantell Thomas to take me to the lunch truck. So we was leaving out and is I said, '**The only reason that I'm not pushing this is because I don't want to go into body wash**,' and we went to the – and that was the end of the conversation.

Q. What do you mean you weren't pushing this because you didn't want to go to body wash? What did that mean?

A. **I didn't want to clean the body wash**; on Saturdays I didn't want to clean–

Q. How was that related to the posting of an overtime list?

A. **Because if they canvass the list then we would have to go, everyone would have to go in the body wash.**"

(TR 281)(emphasis supplied). CAGC simply disregards the above concession that her assignment to the body wash was the natural consequence of the posting.

CAGC disregards other record evidence, which established that Powell had the second fewest overtime hours of the first shift employees and that pursuant to the contractual equalization provision, those with the fewest hours are required to work mandatory overtime if there are not enough volunteers (TR 136, 359, 406). Significantly, Walle's testimony that he treated all employees the same with respect to body wash assignments was never disputed. In fact, Powell admits that someone had to do the cleaning in the body wash area, and concedes that Walle told her he did not care who worked there as long as the work got done (TR 289, 366). The record further established that Walle did not know Powell did not want to work in the body wash (TR 124).

Contrary to CAGC's representation to the Board, Respondent Employer did explain why Powell was retrained and assigned to work in the body wash area. The record evidence established that the number of employees needed to clean the body wash area is dictated by the level of Chrysler's production (TR 132, 142, 981, 987). Walle

testified that when Chrysler runs production six days a week, the body wash area can only be cleaned on Sunday, which requires additional bodies (TR 142). He also testified that Chrysler was running six days during the time Powell was assigned to clean the body wash (TR 142). Powell could not dispute this (TR 368).

Although the record established that the same four male employees worked in the body wash area most of the time on a voluntary basis, the testimony established that others worked there as well (TR 201, 211-212, 226-227, 364, 561, 582, 764, 767, 789, 988, 1044, 1128). The record evidence establishes that six employees worked there the week ending April 15 and the week ending April 22; and that seven worked there the week ending April 29 (TR 228-230; GC 11). Significantly, the record evidence established that Hamlet also cleaned the body wash area the week ending April 29 and established that Powell and Hamlet, the two employees with the fewest hours, were treated the same (See e.g. GC 11). The record evidence also established that Shantell Thomas was assigned to clean the body wash (GC 11). CAGC simply glosses over this important record evidence.

Given the record evidence, it comes as no surprise that the ALJ found no retaliation in Powell's assignment to clean the body wash area. This exception should, therefore, be overruled.

C. Exception 3: Powell's complaints about the overtime list being posted, and complaints about the quality of her representation.

CAGC excepts to the ALJ being perplexed by Powell's testimony about why she pushed the issue of posted overtime. The ALJ wrote:

> "It is perplexing as to why Powell pushed the issue of posted overtime lists. **Her explanation** about low overtime hours and lack of seniority as factors that would cause her to be assigned to the Body Wash **was not credible** since she did not work overtime in the Body wash since

> coming to the first shift, as the overwhelming amount of that work was being performed by a specific group of first shift males. (Tr 278, 287, 407, 414-417, 521, 589). Indeed, **Powell conceded that she did not want to know her overtime hours because she was not 'doing overtime' (Tr. 357.), which conflicts with her statement to the Board that she was working overtime every weekend.** In fact, Powell was able to call out on at least three days that she was assigned to overtime work – March 16, 23 and 29 – in order to avoid overtime work. (Tr. 446; GC Exh. 25.). **In actuality, neither Powell nor Harris wanted the overtime equalization list posted because they would have to work the Body wash area.** (Tr. 281, 592, 617.)"

(ALJD P 4, FN 16)(emphasis supplied). See also: (ALJD P 5, FN 18)("I am perplexed, however, as to why Powell continued to pursue the issue since she, as well as Harris, did not want to work the Body Wash, (Tr. 281, 592, 617)...")

First, the ALJ never indicated that he was perplexed about the quality of Powell's representation, but only about her pushing an issue that she knew would require her to work in an area she apparently had been trying to avoid for years. CAGC is simply mistaken in this regard.

Second, describing Powell's testimony as "perplexing" is probably a nice way to say that her testimony was "tortured" and frankly "absurd." Clearly, Powell was caught in a major inconsistency. While CAGC refers to it as "buyers remorse," the record clearly demonstrates that Powell was playing fast and lose with the truth.

Finally, it is well established that the Board's policy is not to overrule an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's findings are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd., 188 F2d 362 (3rd Cir 1951). Based upon the record as a whole, the preponderance of all the relevant evidence clearly supports the ALJ's credibility resolution in this matter, discrediting Powell's testimony about pushing the posting issue. It was absolutely perplexing and then some. She wanted the list posted,

then she didn't, then she just wanted to point out that it was supposed to be posted. She told the Board she was working every Saturday, but wasn't. This testimony is simply incredible, and cannot be trusted. The ALJ's credibility determination must stand and the exception overruled.

D. Exception 4: The overtime weekend work on May 5.

The ALJ found that after speaking to Faircloth, Powell worked overtime the next five weekends. He further found that Powell was trained in the Body Wash on April 29 and was assigned there on May 5 for the first time as a first shift employee (ALJD P 6, L19-24). The ALJ dropped two footnotes. The first one, FN 23, indicates that the overtime work did not include assignment to the Body Wash. The second one, FN 24, indicates that May 5 was the first day Powell worked in the Body Wash as a first shift employee. While CAGC characterizes this as a contradiction, it is more aptly described as a mistake. Of course, the most important point is that CAGC does not explain how this mistake had any consequence on the outcome of the case. Clearly, it had no bearing upon his conclusions and was of no consequence. As such, the exception should be overruled.

E. Exception 5: The alleged $100.00 bounty Powell made against Faircloth.

The ALJ found that in early May, Powell stated that she wanted to fight Faircloth and offered to pay $100 to anyone who would fight Faircloth (ALJD P 7, L 19-24, FN 32). The ALJ found the testimony of Tanner and Faircloth about the bounty to be credible (*Id*). CAGC excepts to this finding, which essentially attacks the ALJ's credibility determination.

CAGC suggests the ALJ only considered Tanner's testimony, which was contradicted by testimony of other employees. However, CAGC is mistaken in this regard. As Footnote 32 makes perfectly clear, the ALJ considered the testimony of Faircloth and Davis as well. Indeed, Faircloth testified that she heard of the threat from two different employees, and that Powell called her and apologized (TR 1051, 1060-1061).[6] Indeed, Faircloth testified:

> Q: [By Darcie Brault] You also talked about co-workers telling you that Aretha Powell said she was going to pay $100 to have you assaulted?
> A: [By Margaret Faircloth] Yes.
> Q: Okay, who told you that?
> A: Balinda Tanner and Shantell Thomas.
> Q: Did you have any discussion with anybody else besides Balinda Tanner and Shantell Thomas about that threat?
> A: I had relayed the information to LeVaughn Davis, and then I had spoken with Aretha Powell because when she had found out I knew, she had called me and apologized, said she was angry and upset and she was just venting."

(TR 1060). This testimony was corroborated by Davis (TR 923-924).

CAGC contends that the ALJ failed to address, let alone explain, why he failed to consider the testimony of others who said the conversation never occurred. However, the above quoted testimony of Faircloth was considered, and the ALJ found the testimony credible. The ALJ found Tanner's testimony credible as well. The ALJ also cited to Davis' testimony which corroborated the testimony of Faircloth. Moreover, Powell conceded that she may have spoken to Faircloth on the phone the next day although she would not say it was to apologize (TR 460). This is important because Powell testified she hadn't been talking to Faircloth for a month because of the "posting disagreement" (TR 451). Based upon the record as a whole, the preponderance of all the

[6] While CAGC refers to the testimony about Shantell Thomas as hearsay, no objection was raised by CAGC at the time the testimony was elicited.

relevant evidence clearly supports the ALJ's credibility resolution in this matter.[7] The ALJ's credibility determination must stand. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd., 188 F2d 362 (3rd Cir 1951).

For these reasons, the exception should be overruled.

F. Exception 6: The record evidence concerning the discharge decision of Powell.

CAGC excepts to the ALJ's finding that Respondent Employer Site Manager Walle's problem with Powell's attitude was the driving force behind his decision to terminate Powell. CAGC makes several arguments in support of this exception. None of the arguments warrant reversal of the ALJ's dismissal of the 8(a)(3) Charge.

First, CACG argues that the record evidence indicates the only reason relied upon by Respondent Employer in discharging Powell is the threat made to Tanner on May 11. CAGC is mistaken. Although the discharge papers and witness statements do not mention other conduct, the testimony of the witnesses clearly establish problems with her attitude and demeanor which pre-dated the incident that led to her discharge. The credible evidence established that Walle was aware of these problems at the time he was reviewing Powell's threat.

Indeed, when pressed by CAGC on cross examination, Walle had this to say:

Q: [By Robert Drzyzga] Now, isn't it true you checked her personnel file?
A: [By Shawn Walle] Yes, sir.
Q: And found there was no history of any threats or threatening conduct --
A: That is --
Q: -- in her file that she was written up for; is that correct?
A: That is correct, sir.

[7] It is noteworthy that the record evidence demonstrates Powell was upset with Faircloth, who she blamed for the posting going up, which she admitted ultimately resulted in her being assigned to the Body Wash (TR 283-284, 436-437, 616-617, 1086-1087).

Q: **So she had no prior history of either threatening people or engaging in threatening conduct toward people; is that correct?**
A: **That is not correct. She had no documented history.**

(TR 110) (emphasis supplied). CAGC also brought out during cross examination that Powell's "general all around bad attitude gave [Walle] reason to believe Tanner and Faircloth (TR 120).

The record evidence established that both Tanner and Faircloth advised Walle that there had been other incidents with Powell (TR 162, 992). According to Walle, he was advised during the meeting about the threat that Powell had previously threatened both Faircloth and Tanner and had physically struck a male co-worker (TR 162). Walle was referring to the physical altercation Powell had with her ex-boyfriend and co-worker, Dishan Longmire, which had been reported to Walle by Davis (TR 922). According to Walle:

Q: [By Daniel Cohen] Did you receive any information during your investigation that there had been prior threats made by Ms. Powell?
A: [By Shawn Walle] Yes, sir, I did.
Q: Where did this information come from?
A: From Ms. Tanner and Ms. Faircloth.
Q: What did you learn?
A: **I learned Ms. Powell had made other threats to Ms. Faircloth, she had continuously made threats in the past to Ms. Tanner, and I also learned of an incident where she had physically struck a male employee in the break area**

* * * * *

Q: **What was meant in your statement to the – in your affidavit to the NLRB that there was a history with Powell having an attitude?**
A: **She was just a very difficult employee to supervise. She really required a lot of supervision when I had, you know, other employees that really wouldn't require as much. She was always combative. She was always argumentative. She liked to push the limits of her abilities with supervisors. Very difficult employee.**

(TR 162-163) (emphasis supplied). The record also contained unrebutted testimony that Walle received constant complaints from supervisors that Powell was out of her work area (TR 205).

On cross examination, Powell conceded the physical altercation at the plant with Longmire (TR 434, 452, 455). Powell admits the altercation occurred because Longmire was seen embracing Tanner (TR 434, 452-454). Powell testified that she thought Longmire was deliberately trying to make her jealous and that Tanner was against her at the time (TR 454). Powell admitted that she confronted Longmire and pushed him (TR 455). Longmire reported the altercation to Davis who informed Walle of the incident (TR 900-901, 921-922). The ALJ found that "Powell provided inconsistent and less than credible testimony as her reasons for fighting with Longmire" (ALJD P 7, FN 33).

The record also contained evidence that Powell referred to mandatory safety meetings as "bullshit" and "stupid" and established that she wore headphones during and walked out of the meetings (TR 913, 916-917). Powell was also overheard referring to an employee as a "whore" and indicating that "she slept with half the people in this plant" (TR 1061).[8]

Not only does the record evidence establish through multiple witnesses that there had been prior issues with Powell, but the record clearly establishes that Walle had issues with her demeanor and attitude and that he was made aware of the prior incidents involving Powell. The ALJ considered this evidence and found that Walle *already* had a problem with Powell's general attitude, which was the driving force behind his decision to terminate her (ALJD P 11, Line 25-27; P 9, FN 45, citing TR 119-

[8] Of course, that Powell's attitude and demeanor were problems was perhaps best exemplified when she took out a $100 bounty on her co-worker and union steward, Marge Faircloth.

120, 163 above). The ALJ's finding is well-supported by the record and should not be disturbed.

Second, CAGC argues that complaints of "bad attitude" are euphemisms for a pro-union attitude and that Walle's alleged self-serving testimony about Powell's demeanor and attitude are pretextual. CAGC's euphemism argument is misplaced for the simple reason that the record evidence established that Powell wanted out of the union so there is no reason to infer she was pro-union (TR 95-96). Moreover, the Board has long held that use of the terms "bad attitude" and "troublemaker," although subject to a possible suspicious meaning, is not presumptive evidence of union activist or union troublemaker and there must be evidence that the term is being used in such a synonymous manner in the particular case. *Gateway Equipment Co., Inc.*, 303 NLRB 340, 341 (1991); *Guarantee Savings and Loan*, 274 NLRB 676, 679 (1985); *Bosk Paint and Sandblasting Co.*, 266 NLRB 1033 (1983). Given the evidence Powell wanted out of the union and the absence of any other evidence she was a union sympathizer or activist, no inference can be made.

CAGC's pretext argument misses the mark altogether. Indeed, CAGC's characterization of Walle's testimony about Powell's demeanor and attitude as self-serving and pretextual ignores the wealth of corrobated testimony by company and union witnesses that there were demeanor and attitude issues with Powell before she threatened Tanner (TR 110, 119-120, 162-163, 434, 452-454, 455, 900-901, 913, 916-917, 921-922, 992, 1061). In fact, the ALJ found the "credible evidence of coworkers indicates that [Powell] engaged in the fight [with Longmire] because of Tanner"(ALJD P 7, FN 33). This finding is supported by the testimony of Powell's good friend, Marquita

Harris, who said that Powell was angry at Tanner over the incident with Longmire (TR 643-645).[9]

CAGC's argument that pretext can be inferred from the total circumstances and that great weight should be placed on shifting explanations for discharge must be rejected as well. According to CAGC, where an employer is unable to settle on a reason for discharge, but vacillates between several asserted reasons, an inference is warranted that the real reason for the discharge is not among those advanced. Respondent could not agree more with CAGC's statement of the law. However, the record contains no evidence whatsoever of shifting reasons for the discharge decision or vacillation by Respondent. Accordingly, this law has no application to this case. The case of *Steve Aloi Ford,* 179 NLRB 229 (1969), which is cited by CAGC, cannot reasonably be compared to the instant case. In *Steve Aloi Ford,* the respondent provided multiple inconsistent reasons for charging party's discharge:

> "The reason given the employees for their discharges -- **the closing of the new car service line and the transfer of the work to the used car service department** -- is refuted by the record evidence...Further, the economic consideration urged did not require the immediate discharges, for Respondent did not abolish the new car service line at that time but continued to operate the line during the period immediately following the discharges, as evidenced by the fact that two employees were subsequently seen working in that department and the special equipment remained in the separate area for some time thereafter. Therefore, this explanation for the dismissals was weak enough even if it had been advanced with consistency. **But, at various times Respondent gave other reasons for the discharges. Respondent contended at the hearing and in a letter to the Board's Regional Office that McDonald was discharged because he did not have an inspector's license, having failed this test. However, Respondent at a later point in the hearing testified that this failure to obtain the license was not a reason for the discharge.** The record further discloses that McDonald was allowed to continue in his

[9] The record demonstrated that Powell and Harris continued to be friends right up to the time of the hearing (TR 432-433).

> position for several months after his failure to pass the test was known to Respondent. **Similarly, Respondent contended that Stevenson was discharged for belligerency and insubordination, but later testified that this was not the reason. At various times Respondent also assigned two other reasons, poor work and excessive coffee breaks, as reasons for Stevenson's discharge.**"

179 NLRB at 230 (emphasis supplied, footnotes omitted).

By contrast, not once did any witness for Respondent Employer testify that the discharge decision was for any reason other than the reported threat made by Powell against Tanner. Certainly, a fair and balanced reading of the record does not suggest three different reasons for Powell's discharge as CAGC errantly claims.

Next, CAGC argues that Powell's "bad attitude" was in actuality her contractual "complaints" about the posting of the overtime list. According to CAGC, this opened a host of potential problems and was the reason Walle quickly moved to suspend and discharge Powell at his first opportunity, providing three different reasons for her discharge. CAGC's arguments are undisciplined and ignore the record as a whole.

Indeed, the credible testimony established that nobody cared whether the overtime equalization list was posted or not. Walle testified he never gave it a moment's thought and went right ahead and posted the list (TR 147). He testified it was no big deal, no burden on the Employer and did not affect anyone's overtime hours (TR 147, 202). This testimony was corroborated by the Union witnesses, who agreed that posting the list was not an inconvenience or disadvantage to anyone and did not upset anyone (TR 980, 1085-1086). Even Powell admitted that overtime was handled the same way after the list was posted and that the posting was of no benefit to her (TR 429).

Absent from the record is any evidence of comments, concern or hostility by Respondent Employer about posting the overtime equalization list. Viewed objectively,

Powell's comment that the equalization list was "supposed" to be posted was of no consequence and did not cause any animus against her.

CAGC also suggests that by posting the overtime list, Walle and the Union would be subjected to "a lot of hassles and headaches" and that this was the driving factor that led Walle to terminate Powell. Nothing could be further from the truth. CAGC's suggestion is completely unsupportable given the testimony of numerous witnesses that nobody cared whether the overtime list was posted, that it was not an inconvenience and did not affect the hours (TR 147, 202, 980, 1085-1086).

Finally, CAGC argues that Walle's failure to give consideration to the eye witness accounts of a number of supposedly credible witnesses is evidence of hostility towards Powell's Union activities. The first problem with this argument is it ignores the ALJ's finding that the driving force of the decision was Powell's demeanor and general attitude, which were not in any way connected with her protected concerted activities. The second problem with CAGC's argument is that it assumes Walle was somehow not within his right to rely upon the statements of Faircloth and Tanner, neither of whom had ever given him reason to doubt their word (TR 162).[10] Even the ALJ found Tanner's testimony about the incident more credible than the "tentative and inconsistent testimony of Powell" (ALJD P 8, FN 34). The argument also ignores Walle's testimony that Powell admitted to the altercation with Tanner (TR 187) as well as the testimony that when Powell was first called down to Walle's office, she admittedly said, "what did I do now?" and when davis responded that there had been an altercation, Powell immediately responded, "Who? Balinda [Tanner]?"(TR 321-322, 373, 479). The third

[10] Although the ALJ found that Faircloth was not present in the room at the time, there is no evidence in the record that Walle knew this. Notwithstanding, Respondent Employer has cross-excepted to this finding by the ALJ.

problem with CAGC's argument is that there is no logical explanation why then Walle would offer Powell her job back through the grievance process (see e.g. TR 166, 961, 1023, 1028; GC 10b).[11]

The bottom line is that the record simply did not establish that there was a connection between Walle's problems with Powell and her inconsequential protected concerted activities. Without such a causal connection, the ALJ rightly concluded that CAGC failed to demonstrate an unlawfully discriminatory purpose. The exception should be overruled.

G. Exceptions 7 and 8: The ALJ's Summary Dismissal of Complaint Paragraphs 10-13.

CAGC excepts to the summary dismissal of Complaint paragraphs 10-13, arguing that the ALJ provided little or no analysis as to why the allegations were dismissed.[12] As

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[11] Significantly, in addition to Powell, the record shows that Kendell Shepard was offered his job back as part of the grievance process after he, too, was discharged for threatening a co-worker (RE 14 a-c). Shepard was required to take anger management and was responsible for the cost of the classes (TR 55, 170, 865). Shepard went through anger management before returning to work (TR 46, 54, RE 14c). Shepard and Powell were treated the same even though Shepard did not engage in any protected concerted activity. This further supports the ALJ's finding that there was no causal connection between Powell's protected concerted activity and her discharge.

[12] While it is true that anti-union animus may be inferred from manifest hostility towards unionization combined with knowledge of an employee's union activity, coincidence in time between the union activity and the adverse action, disparate treatment, implausible or shifting reasons, and the employee's good work record, the cases cited by CAGC are easily distinguished and serve to highlight precisely why the ALJ decision should be adopted by the Board. Significantly, the cases cited by CAGC involved egregious facts with literally every factor present. *Active Industries, Inc.*, 277 NLRB 356 (1983)(Employer fired 1/3 of the workforce nine days after union organizing campaign began, each employee had just received "average" or "excellent" ratings on performance evaluation, supervisor stated that the union was the reason for the discharges, Employer admitted that three employees were discharged because they "were the ones involved" in "union activism"); *Sawyer of Napa*, 300 NLRB 131 (1990)(Discharge occurred two days after employee sympathies for union became known to Employer, there was evidence of disparate treatment, the Employer provided a false reason for the discharge as well as multiple different reasons for the discharge); *NLRB v. Ind. Erectors*, 712 F2d 1131 (7th Cir 1983)(The evidence established that the employer had manifested hostility towards the union and had knowledge of the laid off employees' union activities, the lay-offs occurred two days after the union filed its election petition, there was a close correlation between the lay-offs and a list identifying employees as either for or against the union, the reason for the lay-offs was

will become evident, the findings and conclusions are well supported by the record evidence and must stand.

(1) Powell's Work Assignment Change.

The ALJ found that on April 20, Respondent's Site Manager, Lamont Richie, informed Powell of a change in her work assignment by requiring that she perform her normal duties in four hours, and that the remainder of her shift would be dedicated to sweeping floors in the main plant (ALJD P 6, L 20-22). CAGC states that this essentially doubled her work duties referencing pages 296-297 of the transcript. Nothing could be further from the truth. Significantly, the ALJ did not find that her work duties had been doubled. A review of the record demonstrates that her duties were not doubled:

> Q: [By Robert Drzyzga] After the meeting with Shawn Dean --
> A: [By Aretha Powell] Yes.
> Q: --did you have a change in your work assignments?
> A: Friday, I believe it was a Friday, April 20th I believe, I'm not sure, Lamont called me and he was like, 'Aretha, we're changing your assignment. **You're going to do your buildings for four hours and you're going to come in the plant for four hours.'** And I was like, 'Okay.'

(TR 296)(emphasis supplied). On cross examination, Powell described her "changed" job as going from eight hours to four hours in the Linkers Building, the fitness center and jitney repair, with the remaining four hours in the plant sweeping (TR 523). Powell admitted that sweeping floors was a typical janitorial duty that she had

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implausible and each of the laid off employees had a good employment record); *W.F. Bolin Co. v. NLRB*, 70 F3d 863 (6th Cir 1995)(Employees who complained about travel pay under CBA were laid off shortly afterwards for lack of work, supervisor threw the contract on the floor without examining it and another supervisor responded, "If you guys keep complaining I'm going to fire the whole crew and bring in a whole new crew," the two employees were treated differently from those employees who took a less active role in complaining about what they believed was non-compliance with the CBA, and the reason for the lay-offs was contradicted by the subsequent hiring of a new employee less than two weeks after the lay-off for lack of work).

performed in different locations for the last year of her employment (TR 341; see also RE1). She concedes that the sweeping she was doing in the plant was the same as the sweeping she had performed in other areas and that she did not find sweeping objectionable (TR 342, 343). Powell also admits she did not file a grievance over this (TR 343).

CAGC also argues that the Employer harbored hostility against Powell for her union and protected concerted activities because the job change occurred shortly after Powell was called out of a union meeting and directed to return to work. While Respondent disagrees with CAGC's characterization, the important point is that the change in job duties is of no consequence because it does not constitute adverse action, which is part of CAGC's burden. *Northeast Iowa Telephone Co*, 346 NLRB 465, 475 (2006). Essentially, where it is alleged that a transfer or altered work assignment constitutes an adverse employment action, it is "the General Counsel's burden to show that the work assigned [to the claimant] was more burdensome, undesirable, or unpleasant than his former duties." *US Borax Inc*, 2002 NLRB LEXIS 138 (2002), quoting *King David Center*, 328 NLRB 1141, 1143 (1999). Where there is no evidence that the work has changed for the worse, the General Counsel fails to meet that burden. *Northeast*, 346 NLRB at 475.

The Board has already rejected the precise argument made by CAGC. In *King David Center*, the Board stated:

> "we do not agree that [the respondents] unlawfully imposed more arduous working conditions on [the claimant] by transferring her...**Critically, there is no showing that the work performed by certified nurse assistants in this section was more burdensome, undesirable, or unpleasant than the duties that [the claimant] had performed had performed as a certified nurse assistant in another area of the facility** for the previous 2 years. The only evidence

> on the issue is that [the claimant] was unfamiliar with the patients in the acute care section."

Id at 1144 (emphasis added). The same result is required here. Powell admitted that sweeping is typical janitorial work that she has performed throughout her employment and that it is the same work regardless of where it is performed. She also concedes that she did not find sweeping objectionable.

Therefore, the absence of any analysis by the ALJ is of no consequence, and does not warrant reversal. *Allied Mechanical Services*, 346 NLRB 326, 328 (2006)(it is harmless error where sufficient evidence supports the judge's conclusion).

(2) Body Wash Assignment.

CAGC argues that the ALJ erred in finding no causal connection between Powell's protected concerted and union activities, and her assignment to the body wash. According to CAGC, the ALJ failed to consider that after Powell made her complaint regarding overtime equalization, she was told by Respondent Employer and Union that posting the list would require her to work in the body wash, something Respondent Employer knew she did not want to do.

Initially, it must be pointed out that Powell never complained about overtime equalization, but that the overtime list was supposed to be posted. Second, contrary to what CAGC claims, there is no evidence in the record that Powell was told by Respondent Employer or Respondent Union that posting the list would require her to work in the body wash. CAGC certainly does not provide a citation to any record evidence. Significantly, the only thing Walle said is that he did not care who cleaned the body wash as long as it got done (TR 289). Moreover, Walle's testimony that he did not

know Powell did not want to work to work in the body wash stands unrebutted on the record (TR 124).

What the record evidence does establish is that after raising the issue about the overtime list being posted, Powell and her friend, Harris, realized that both of them would have to work in the body wash area if the overtime list was posted (TR 617). Significantly, Harris admitted that without the list being posted, they could avoid having to work in the body wash area (TR 617). Similarly, Powell admitted that the only reason she was not pushing the issue was because she would have to work in the body wash area if the list was being canvassed (TR 281). Of course, this testimony supports the ALJ's finding that Powell's body wash assignment was the direct result of her advocacy for the posting of the list and that such a response could hardly be deemed an adverse action, as it was a direct result of the Company action that she advocated (ALJD P 11, L 32-35). Moreover, Powell's concession that cleaning the body shop was bargaining unit work and that someone had to do it further supports the ALJ's finding that the assignment was not adverse action.

CAGC also argues that after making her complaint about the posting of the overtime list Powell became the only additional employee trained and then assigned to work the body wash, something Respondent Employer knew she did not want to do. According to CAGC, no other employees were trained or assigned to work in the body wash. CAGC is clearly mistaken. The record evidence established that Powell had the second fewest overtime hours of the first shift employees[13] and that pursuant to the contractual equalization provision, those with the fewest hours are required to work mandatory overtime if there are not enough volunteers (TR 136, 359, 406).

[13] Derrick Hamlet had the fewest overtime hours (TR 359).

Significantly, the record evidence established that Hamlet also cleaned the body wash area the week ending April 29 and establishes that Powell and Hamlet, the two employees with the fewest hours, were treated the same (See e.g. GC 11). The record evidence also established that Shantell Thomas was assigned to clean the body wash area the week ending April 22 (GC 11).

Powell did not and cannot dispute the legitimacy of her body wash assignments (TR 368). In this regard, the record evidence established that the number of employees needed to clean the body wash area is dictated by the level of Chrysler's production (TR 132, 142, 981, 987). Walle testified that when Chrysler runs production six days a week, the body wash area can only be cleaned on Sunday, which requires additional bodies (TR 142). He also testified that Chrysler was running six days during the time Powell was assigned to clean the body wash (TR 142).

Although the record established that the same four male employees worked in the body wash area most of the time on a voluntary basis, the record evidence established that six employees worked there the week ending April 15 and the week ending April 22; and that seven worked there the week ending April 29 (TR 228-230; GC 11).

Given the record evidence, it comes as no surprise that the ALJ found no retaliation in Powell's assignment to clean the body wash area.

(3) Powell's May 10th Discipline.

CAGC excepts to the dismissal of the Complaint allegation concerning Powell's May 10 discipline, claiming that the ALJ provided no analysis. The ALJ found that Powell was observed walking from the area where the safety meeting was being conducted to the bulletin board near the cage area, a distance of 40 to 50 feet (ALJD P

6, L 30-31; P 7, L 1). The ALJ found that at the conclusion of the meeting, Powell was asked what the safety tip of the day was and she did not know that it dealt with cautionary advice to be observant of hi-lo vehicles in their work areas (ALJD P 7, L 5-8). The ALJ also found that Powell did not provide credible evidence that she was paying attention to the presentation (ALJD P 7, FN 29).

CAGC argues that others moved around during pre-shift meetings in the presence of supervisors without receiving discipline. CAGC suggests that Powell was the only employee in the history of the company disciplined for moving around during a pre-shift meeting and not knowing what the safety tip of the day was. This, CAGC claims is disparate treatment. CAGC relies upon testimony that Respondent Union chairperson, Davis was outside the cage the following day during the pre-shift meeting and frequently discussed union business outside the cage area during pre-shift meetings. CAGC also relies on testimony that others were observed outside the cage area in January, 2013 as well.

According to CAGC, the record evidence established that pre-shift misconduct was a problem with the whole group, that nobody else was disciplined during the year and a half that Richie was conducting the pre-shift meetings, and that there was no record evidence why supervisors would condone misconduct by the others. CAGC also boldly suggests that because three supervisors questioned Powell about the safety tip of the day, what he considers a low-level write-up, it is apparent Respondent was targeting her.

CAGC's arguments are misleading and disregard the wealth of record evidence confirming the legitimacy of Powell's May 10 write-up. First, the evidence established that in early May, Davis and Faircloth observed Powell wearing headphones, singing

loudly and walking out of pre-shift meetings while supervisors were addressing the first shift (TR 913, 916-917, 1047). Davis testified he overheard Powell say the meetings were "bullshit" and "stupid" (TR 917). Richie addressed these behaviors with Davis and told him he cannot have Powell walking out of and disrupting the meetings (TR 918, 999). Richie advised Davis that he would address the whole group, and did the following day, by advising them that everyone needed to attend the meetings and give their undivided attention (TR 918, 1040, 1048).

Powell received her write-up after Richie made his announcement to the whole shift that he needed everyone at the meetings paying attention (TR 919, 1112). According to Davis, Powell was the only employee to leave a meeting after Richie's announcement to the whole group (TR 1040). This testimony stands unrebutted.

Richie and Walle were both present at the meeting on May 10 (TR 151-152, 255). Both testified they observed Powell walk away from the meeting to the bulletin board and return as the meeting was concluding (TR 152, 256). Both testified they were present when Paulson confronted her and asked her what the safety tip of the day was and that Powell did not know it (TR 153, 256-257). There is simply no evidence that all three supervisors questioned her and CAGC's claim of "apparent targeting of Powell" must be rejected as unsupportable by the record.[14]

Powell testified that she left the meeting, went over to the bulletin board and signed up for overtime (TR 299-300, 354). The testimony established that Powell was 40 to 50 feet away from where the safety meeting was being conducted (TR 152, 836).

[14] While CAGC cannot be faulted for thinking this was a low-level write-up, given his own experience working in a federal office building and not an automotive plant, it is doubtless so that automotive plants are inherently dangerous any safety must be emphasized (TR 147). Clearly, any contact between a hi-lo and an employee will not be pretty. This is precisely why Respondent Employer needed employees to pay attention at safety meetings.

The ALJ discredited her testimony that she was signing up for overtime given the weight of the evidence that she did not want to work overtime (ALJD P 7, FN 26). Based upon the record as a whole, the preponderance of all the relevant evidence clearly supports the ALJ's credibility resolution in this matter. The ALJ's credibility determination must stand. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd., 188 F2d 362 (3rd Cir 1951).

According to Powell, at the conclusion of the meeting, Richie asked her what the morning meeting was about. Admittedly, Powell did not say what the safety tip of the day was when asked (TR 300). Although Powell could have presented an alternate version of events and disagreed with the supervisor's statement of the incident, she merely noted "RTS" on the disciplinary form (meaning refused to sign)(TR 353-354). Powell did not grieve the write-up either (TR 355, 1050). The ALJ noted that "Powell did not provide credible evidence that she was paying attention to the presentation" (ALJD P 7, FN 29).[15] As there is absolutely no record evidence that Powell knew what the safety tip of the day was or that she was paying attention to the safety meeting, the ALJ's credibility determination should not be disturbed. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd., 188 F2d 362 (3rd Cir 1951).

While the witnesses for CAGC indicated that others walked away from pre-shift meetings without receiving discipline, when pressed on cross examination, it became apparent that the examples they offered were far from similar and not observed by

[15] In apparent recognition that she would not be able to convince the ALJ that she could hear the safety meeting or that she was paying attention to the safety-tip of the day, Powell testified that the bulletin board was only 15 feet from the meeting (TR 276). Similarly, Patrice Williams told the NLRB in her affidavit it was 5 feet away, but then said it was 17 feet away when pressed on cross examination at the hearing (TR 737, 761). Richie, however, measured the distance with a tape measure and it was 45 feet(TR 836).

Paulson, Richie or Walle. For example, Williams suggested that she observed Faircloth warming her food in the microwave during a meeting (TR 739). Yet, when cross examined, she admitted the microwave was right near the picnic table (rather than 45 feet away), and that Vanessa Heimer was the supervisor at the meeting. In fact, Williams could not say whether Heimer even saw her (TR 755-756). Hudson similarly testified about Faircloth warming food, others going to their lockers and how he walked over to the bulletin board himself (TR 790). However, Hudson conceded that this occurred in front of the new supervisor, Vanessa Heimer (TR 791). There is no credible evidence that the decision-maker for the May 10 write-up was present or had knowledge of these other distinguishable circumstances.

Significantly, standing at the lockers or the microwave, which are near the picnic table, pales in comparison to wandering over to the bulletin board 45 feet away where one cannot hear what is being said. Richie testified he was not aware of anyone else doing what Powell did at the pre-shift meetings (TR 837). And, there is no evidence Walle was aware of any similar situations (TR 369). Of course, most significantly, no evidence exists on the record that any of these other employees were not paying attention and did not know what the safety tip of the day was. CAGC ignores these important dissimilarities, which shows that these others are not similarly situated. *St. George Warehouse, Inc.*, 349 NLRB 870, 879 (2007); *Lee Builders*, 345 NLRB 348, 352 (2005)("An essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminate was treated"). On this record, that "essential ingredient" is missing.

CAGC makes much of Davis being absent from pre-shift meetings. However, the record evidence is plain: Davis was excused from the meetings as the union chairperson

to find out from a union steward what occurred on the third shift (TR 1038-1039). As such, Davis is not similarly situated and his absence from the meetings is of no consequence. *Lee Builders*, 345 NLRB at 352.

CAGC's reliance on Hudson's testimony that he observed someone standing outside the cage area in January, 2013 is irrelevant and immaterial. First, the ALJ sustained Respondent's objection that testimony occurring eight months after the May 10 incident was irrelevant. Hudson's testimony does not establish who was standing outside the cage area or why the person was standing outside the cage area. Without such context, Hudson may have been referring to Union Chairperson, Davis finding out from the third shift steward what happened on the third shift. This testimony is of no consequence either.

Based upon the record evidence as a whole, no argument can be made that Powell was treated different than any similarly situated employees. As such, CAGC's reliance on *Owens Corning Fiberglass Co.*, 236 NLRB 479 (1978) and *Health Management, Inc. v. NLRB*, 210 F3d 371 (6th Cir 2000) is misplaced as the cases have no application to the facts herein. In *Owens Corning*, for example, it was undisputed that the charging party was one of many employees who were caught openly drinking alcohol in the plant; yet only charging party, a known union activist, was discharged for violating the drug and alcohol policy. 236 NLRB at 480. Indeed, there is no record evidence that other employees, who might have been warming food at the microwave or at their lockers just a few feet from where the meeting occurred, were not paying attention and/or did not know what the safety tip of the day was.

What we are left with is credible evidence that Powell did not pay attention to a safety meeting and did not know what the safety tip of the day was because she left a

meeting to go over to a bulletin board that was 45 feet away for no apparent reason (as the ALJ discredited her testimony that she went there to sign up for overtime). This occurred after Richie told the whole shift that he needed everyone's undivided attention at the pre-shift meetings (TR 919, 1112). No witness disputed this and the record stands unrebutted. No evidence exists that others were not paying attention or did not know what the safety tip of the day was. As such, CAGC simply did not carry his burden that similarly situated employees were treated more leniently. *St. George Warehouse, Inc.*, 349 NLRB 870,879 (2007)("Here because Daniels' conduct was unprecedented, there are no similarly situated employees with whom to compare him. Therefore, the record does not support a finding of disparate treatment"); *Lee Builders*, 345 NLRB at 352.

Nor can it be said that Powell's write-up was motivated by animus. No witness testified that pre-shift meetings and safety tips were unnecessary or unimportant. Instead, the testimony established that the meetings were mandatory and that safety was emphasized because SHAP was an inherently dangerous workplace. CAGC is mistaken that the ALJ provided no analysis for dismissing this Complaint allegation. In this regard, the ALJ found that Powell left a safety meeting while cautionary advice was being provided about hi-lo traffic in the plant, was not paying attention and did not know the safety tip of the day. The exception should be overruled.

(4) Powell's May 12 Suspension and May 16 Discharge.

CAGC excepts to the ALJ's finding and conclusion that Powell's suspension /discharge was not retaliatory in violation of Section 8(a)(3). The ALJ found that Walle already had a problem with Powell's general attitude which was the driving force behind his decision to terminate her. The ALJ also found that there was no indication that Walle's problems with Powell were at all connected in any way to her protected

concerted activities, such as her demands that the overtime list be posted on the bulletin board. According to the ALJ, "[w]ithout a causal connection between the alleged coercive or restraining activity and exercise of protected concerted activities under Section 7, the General Counsel has not established that the Company violated Section 8(a)(3) by firing Powell due to an *unlawfully* discriminatory purpose." (ALJD P 11, L 35-38)(emphasis in original).

CAGC first argues that the ALJ failed to consider in his analysis that Powell was the only employee on the first shift that was retrained and newly assigned to the body wash in the April and May timeframe and that Walle and Faircloth established that the overtime list had not been posted because second and third shift employees were complaining about not receiving enough overtime opportunities and filing grievances over the issue. Moreover, CAGC suggests that posting the overtime list would open Walle up to the same problems he experienced in the past, employee complaints and the list being torn down or defaced, which is why he made the agreement with the local Union in 2009 to not post the list in the common areas as noted by the ALJ (ALJD P 3, L 27-30).

First, there is no reason to believe that the ALJ did not consider this information in his analysis. The record evidence established that Powell and her co-worker, Marquita Harris, are the ones that actually benefited by not having the list posted. In this respect, Harris conceded that she and Powell did not want to work in the body wash area and were able to avoid that work as long as the overtime list was not posted (TR 617). Powell admitted that she was not pushing the posting issue was because she did not want to go back into the body wash and "if they canvass the list then we would have to go, everyone would have to go in the body wash" (TR 281). Of course, this testimony

more than adequately supports the ALJ's finding that Powell was assigned to the body wash on May 5 as a natural consequence of her advocacy for the posting and his finding that the body wash assignment could "hardly be deemed an adverse action" (ALJD P 11, L 33-34). Of course, this also explains why the ALJ was perplexed as to why Powell was pushing to have the list posted, when the obvious consequence would be that she would be assigned overtime in the body wash.

The non-retaliatory nature of Powell's body wash assignment is also adequately supported by the record evidence which established that Powell had the second fewest overtime hours of the first shift employees and that pursuant to the contractual equalization provision, those with the fewest hours are required to work mandatory overtime if there are not enough volunteers (TR 136, 359, 406). The record evidence also established that, while the same four male employees worked in the body wash area most of the time on a voluntary basis, the six employees worked there the week ending April 15 and the week ending April 22; and seven worked there the week ending April 29 (TR 228-230; GC 11). Significantly, the record evidence established that Hamlet also cleaned the body wash area the week ending April 29 and established that Powell and Hamlet, the two employees with the fewest hours, were treated the same (See e.g. GC 11). Moreover, the record evidence established that Shantell Thomas worked in the body wash the week ending April 22 (GC 11).

Quite frankly, regardless of the reason why Walle and Union Chairperson Davis agreed to take the posted overtime list down in 2009, the record evidence established that putting the overtime list back up was not a problem. The credible testimony established that nobody cared whether the overtime equalization list was posted or not. Walle testified he never gave it a moment's thought and went right ahead and posted the

list (TR 147). He testified it was no big deal, no burden on the Employer and did not affect anyone's overtime hours (TR 147, 202). This testimony was corroborated by the Union witnesses, who agreed that posting the list was not an inconvenience or disadvantage to anyone and did not upset anyone (TR 980, 1085-1086).

CAGC's representation that the ALJ found the overtime list was taken down due to complaints and the list being torn down or defaced is mistaken. The ALJ found that Walle and Davis agreed to take the overtime list down because it was frequently removed or laced with profanities (ALJD P 3, L 29-30). This finding is supported by Walle's testimony:

> Q: [By Daniel Cohen] Okay. So tell me why it is that the board was in your office for – as long as three years, I believe was your testimony?
> A: [By Shawn Walle] Well, a lot of the postings that management would put up such as equalization or job postings, overtime signups, they would just disappear from the board or they would be defaced, statements from management would be put up there, they would be defaced, just everything would disappear. It cut it out a lot when it was posted in my office. It was an agreement I made with the Union that if we just put everything up there it would save everybody a lot of hassle and headache.

(TR 146-147).

CAGC's suggestion that posting the list opened Walle up to the same problems he experienced in the past is largely speculative and ignores the testimony from numerous witnesses from the company and the union that nobody cared whether the overtime list was posted, that it was not an inconvenience and did not affect the hours.

CAGC's second argument is that the ALJ did not specify in his analysis how he distinguished the "disparate treatment" evidence. CAGC argues that the incident

involving Kendall Shepard was much more egregious than Powell's threat.[16] Even if CAGC is right that Shepard's circumstances were more egregious, Shepard was discharged as well. The ALJ found that:

> "After Davis met with Walle, the Company agreed to settle the grievance by reinstating Powell, with no backpay, on the condition that she complete anger management class and submit to a 90-day last chance agreement. **The proposed settlement was consistent with the recent settlement of Kendall Shepard's grievance after he was terminated for threatening Faircloth in June 2011.** Shepard accepted the settlement, completed its conditions and was reinstated."

(ALJD P 9, L 22-27)(emphasis).

This finding is supported by the record evidence. The record established that Shepard verbally confronted Faircloth and made threatening and intimidating statements toward her (GC 7B, 7C, 7D). The matter was reported to Walle, who investigated the incident and involved Little just as he did with the Powell incident (TR 169, 864). During the investigation, Walle learned of other incidents with Shepard although nothing had been documented in his file (TR 170). Shepard was discharged and filed a grievance (GC 7B). The grievance was resolved with reinstatement, a last chance agreement and anger management (TR 170, 959). It is uncontroverted that Shepard was required to take anger management at his own expense (TR 46, 55, 170). He completed anger management and was returned to work (TR 966-967; RE 14c). The Shepard and Powell circumstances and how Respondent Employer handled them are nearly on all fours. The only substantive differences are: (1) Shepard did not engage in any protected concerted activity, and (2) Davis was unable to resolve his grievance at the

[16] CAGC's suggestion that there was a history of prior threats by Shepard as documented in Faircloth's written statement of Shepard's threat toward her elevates form over substance as Walle was made aware of prior incidents involving both Shepard and Powell, and the record established that Powell physically struck a co-worker and offered a $100 bounty on Faircloth.

second step. Clearly, however, this is not "disparate treatment" evidence that CAGC can use.

CAGC also argues that the ALJ did not mention, let alone distinguish, the incident between Union Chairman Davis and Morris Johnson. CAGC argues that the disparity between the Davis/Johnson incident and Powell is great. In this regard, CAGC suggests that Davis accosted and assaulted Johnson; yet Davis and Johnson only received a written warning for a minor infraction. CAGC also claims that Little's testimony that she did not consider Davis' behavior threatening is incredible.

The incident relied upon by CAGC occurred nearly four and a half months after Powell's discharge on September 24 (TR 238, 674, GC 24). The incident was instigated by Morris Johnson and began when he asked "what the fuck is LeVaugn doing here" (TR 675, 690). Davis responded and the two argued. Johnson testified that Davis got loud and he got loud back (TR 676). Johnson further testified he and Davis both were cursing at the other (TR 676). Although Johnson testified that Davis approached him on three occasions as he backed up and put his finger in his face, Johnson admits he was exchanging words as he stepped back and was using profanity, including the "f" word (TR 676-677, 692).

After the incident was reported to Richie by Davis, Richie conducted an investigation and obtained statements (TR 238, 695, 697). Richie testified that he interviewed both Johnson and Davis and neither one said they had been physically threatened by the other (TR 253). Both wrote statements, and Richie gathered statements from Eddie Bullard, Jackie Keyes and Karen Pringle as well (TR 248, GC 24). None of the eye witnesses indicated that a threat or physical altercation occurred (*Id.*). In fact, Bullard stated the two "argued back and forth for a minute then it was over" (GC

24(4)). While Johnson and Davis each claimed they had been intimidated by the other, neither one indicated that a threat of physical harm had been made (GC 24 (9-14)).[17] Johnson and Davis discussed the incident for approximately two and a half hours later the same day. Johnson concedes Davis was in a "better manner" and was professional (TR 678, 698).

Both Johnson and Davis received written warnings for the incident (TR 239, 680, 984, GC 24 (1-2)). Significantly, Johnson's testimony contradicted the documentary evidence. While he testified that he disagreed with the write-up, Johnson actually noted his agreement with the write-up on the form itself (TR 682, 700, GC 24 (1)). Of course, this evidence is extremely important because Johnson was called as a witness for CAGC and he attempted to characterize this incident as much more than it actually was.

Little was consulted by Richie and approved the write-ups (TR 866-867, 881). Little viewed the incident as a two-way heated argument, which did not involve a threat of bodily harm or a physical touching (TR 867, 881). According to Little, Richie's investigation did not establish a threat and the written statements lacked "threatening words" (TR 887, 890). Little's view of the incident was corroborated by the statements of the eye witnesses, who were not called as witnesses by CAGC. Curiously, CAGC suggests that Little's testimony was incredible. In this respect, CAGC argues that Little's distinction between non-verbal and verbal threats was incredible as "placing your finger in [a] person's face is a form of non-verbal communication which would be considered threatening by everyone" (CAGC Brief at p.17). Apparently, such conduct would be considered threatening by everyone **except the three eye witnesses and by**

[17] Johnson's statement does not describe a threat of physical harm. In fact, Johnson does not even use the words, "threat" or "intimidate" in his statement, but says Davis was "aggressive" *Id.*

Johnson himself since none of them described the incident as threatening. In fact, Johnson agreed that this was "discourteous" on his write-up (GC 24 (1)(4)(5)(6-8). Clearly, CAGC did not call the three eye witnesses to the incident because their eye witness accounts did not support a "threat" but established that there had been a brief "heated argument" as Little found.

CAGC's reliance on the Johnson-Davis incident as disparate treatment evidence is simply misplaced. Initially, the incident occurred four and a half months after Powell's discharge and should not be considered at all. *Tera Advanced Services Corp.*, 259 NLRB 949, 950 (1982). Since this after-the-fact incident sheds no light on the motive of the decision-maker, it should come as no surprise that the ALJ did not make mention of it. Second, it was not investigated by Walle, but by Richie who concluded that neither one had been physically threatened by the other. Third, none of the eye witness accounts indicated a threat of physical harm or a physical altercation occurred. One eye witness described the exchange as an argument back and forth for a minute. Little viewed the incident as a heated argument and testified that the statements lacked "threatening words." And, Johnson's attempt to make this appear more serious than it actually was was thwarted when he contradicted the documentary evidence prepared well before his shifting testimony was adduced at trial. Simply put, Respondent Employer did not have corroboration of a threat of physical harm as it did with Powell. [18] Finally, there is no record evidence of prior problems with Johnson or Davis as there was with Powell. The past problems with Powell's attitude and demeanor, which are well

[18] Although CAGC claims that Respondent terminated Powell for an alleged threat that is uncorroborated and based on false testimony, the record contains not a thread of evidence that Respondent knew or should have known of such claims since the corroborating witness was a union steward and Powell conceded that an altercation occurred between her and Tanner. Of course, as will become evident in the text, *infra,* absent evidence that Respondent was acting in bad faith or knew the statement to be false, such an allegation is not dispositive.

supported by the record and corroborated by the other witnesses, clearly distinguish the two situations.

Next, CAGC argues that Walle's reliance on verbal information from Tanner, Faircloth and Davis without relying on verbal statements from witnesses who told him they did not see or hear an altercation involving Powell is evidence of pretext, citing *Frances House, Inc.*, 322 NLRB 516, 521-522 (1996). However, *Frances House* simply cannot be cited for such a proposition. Significantly, in *Frances House*, ALJ Wilks specifically found the reasons advanced by the respondent to be "inconsistent, contradictory, uncorroborated by available witnesses, undocumented or falsely documented." ALJ Wilks also found the discipline "unprecedented, disparate and out of proportion to the nature of misconduct even if it occurred." 322 NLRB at 522. The record evidence in the instant case simply does not support similar findings. The record evidence established that Walle had no reason to doubt Tanner or Faircloth (TR 162). Moreover, Powell admitted to prior incidents (TR 453-455).

Finally, CAGC argues that the ALJ failed to analyze and explain why the totality of the circumstances and timing in this case does not establish a causal connection and discriminatory motive. CAGC relies on the events that occurred during the month after she raised the issue about the overtime posting and suggests that Respondent terminated her for an uncorroborated threat based upon false testimony of her union steward and local union executive board member.

As set forth in response to Exceptions 7 and 8 (1) – (3), *supra* at pp 20 - 31, the alleged change in job duties does not amount to an adverse action under Board law. Powell's write-up for not paying attention and for not knowing the safety tip of the day is eminently legitimate and does not establish a violation of the Act. Moreover, Powell's

assignment to the body wash area was the natural consequence of her own advocacy for the posting of the overtime list, which she admittedly knew would lead to an assignment in the body wash area because of her low number of overtime hours. As such, there is nothing sinister about Respondent Employer's action as CAGC would have us all believe.

As for the discharge decision, there is no evidence on the record that Walle knew or should have known that Faircloth's statement was false as alleged by CAGC.[19] There was no evidence presented at the hearing that Walle had any information at the time of the decision that Tanner or Faircloth could not be trusted. In fact, Walle testified that neither had given him reason not to believe them (TR 162). Even the ALJ found Tanner more credible than Powell concerning the incident (ALJD P 8, FN 34). Moreover, Hudson did not come forward until well after-the-fact with his statement calling into question Faircloth's presence when the threat was made (TR 798).[20]

The Board's good faith or reasonable belief doctrine has been spelled out on a number of occasions. See e.g. *McKesson Drug Co.*, 337 NLRB 935, 936 at fn. 7 (2002) where the Board noted:

> In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), **an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him.** See *Yuker Construction,* 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods,* 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct

[19] Respondent Employer has cross excepted to the ALJ's finding that Faircloth was not in the cage area when the incident occurred with Powell and Tanner.

[20] Hudson's testimony that he and Faircloth passed each other in the doorway as she was entering the cage area is not inconsistent with her testimony that she was present when the threat was made by Powell, but actually explains why Hudson's version of what occurred differed from the other witnesses: he left before the threat was made (TR 785, 795).

> actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy,* 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself). . . . [Chairman Hurtgen's concurring comment omitted.]

Id. (emphasis supplied). See also *Jordan Marsh Stores Corp.,* 317 NLRB 460, 476 (1995), where the Board adopted Judge Michael O. Miller's statement of the law: "To rebut that prima facie case and show that Ray would have been discharged for the same conduct even in the absence of her union activity, Respondent must only show that it reasonably believed that she had engaged in misconduct of a level warranting termination. *GHR Energy Corp.,* 294 NLRB 1011, 1012-013 (1989), enfd. 924 F.2d 1055 (5th Cir. 1991)."

No less is required here. The record evidence established that two union employees came forward with statements that Powell made a threat. The corroborating witness was the union steward. No other witness wanted to provide a written statement. The witnesses interviewed simply said that they neither saw nor heard anything similar to the witness in *Bonanza Aluminum Corporation,* 300 NLRB 584, 589-590 (1990)("That Hall did not attempt to interview all possible witnesses to the incident does not raise an inference of unlawful conduct. Under the circumstances, I find Hall's investigation was entirely adequate. **I also find that Hall had a good faith belief that Bonales committed the infraction").**

Respondent Employer had a work rule that subjected employees to discharge without warning for threatening a co-worker. This rule had been enforced less than a

year earlier when Kendall Shepard threatened a co-worker, and Walle and Little were both involved in the discharge of Shepard. Based upon the evidence available to Respondent Employer at the time of Powell's suspension and discharge, it simply cannot be said that there was not at least a reasonable belief that Powell engaged in misconduct of a level warranting discharge. *See e.g. Detroit Newspapers*, 340 NLRB No. 121 (2003)(The assessment of the Respondent's belief must be based on the evidence available to it when it took the action it did).

While it is not even necessary to establish that Powell actually threatened Tanner in accordance with the Board's long-standing good faith reasonable belief rule, the record evidence actually suggests that she did, in fact, threaten Tanner. Clearly, she was motivated to make the threat. Powell was already angry with Tanner because she was told Tanner had hugged and kissed Longmire just the day before the incident. She was not speaking to Tanner because she viewed her as a "shit starter" (TR 478-479). Powell's testimony that she told Larry Moore "I'm grown and still haven't got my ass whooped, but those who laugh least laugh last" and her testimony that Tanner replied, "that ain't gonna happen; that ain't gonna happen" is quite telling because Tanner's alleged response is simply not responsive to what Powell claims was said. It is highly suggestive that something else was said to prompt Tanner's response. Moreover, Powell admits that Tanner interrupted her, that she did not want Tanner in her conversation and that she looked up at Tanner (TR 474, 475, 480). This actually corroborates Tanner's statement that Powell looked at her in a threatening manner, although Powell would have us believe she looked at Tanner because she was confused by what Tanner was saying. Most significant, however, is Powell's testimony that the first thing out of her mouth when Davis asked her whether she had been in an altercation was, "Who?

Balinda?" (TR 373). This spontaneous utterance admitting to an altercation is highly suggestive that Powell made the threat. It also likely explains why the ALJ "found Tanner's testimony more credible than the tentative and inconsistent testimony of Powell" (ALJD P 8, FN 34).

H. Exception 9: Walle's Alleged Coercive Interrogation of employee Keys

CAGC excepts to the ALJ's application of the totality of circumstances approach set forth in *Rossmore House*, 269 NLRB 1176 (1984). CAGC argues that Walle's interview of Keys about her statement to the NLRB was coercive in violation of 8(a)(1). The ALJ concluded that the allegations of coercion were to be analyzed under the totality of circumstances approach rather than *Johnnie's Poultry* because the Board trial had not yet been scheduled.

According to the ALJ,

> "In this case, the background reveals no history of Company hostility towards the Local Union; indeed, Wille [sic] and Davis worked extremely well together. The meeting was conducted in Wille's [sic] office with Davis, the Union representative present. The meeting was formal, but brief. The information sought by Wille [sic], Keys direct supervisor, related to whether Keys provided the Board with the incorrect information that Wille [sic] did not interview her during the disciplinary investigation when he actually did; the question was obviously based on public information in the charges and did not involve anything confidential in nature. Under the totality of the circumstances, I do not find the interrogation unlawfully coercive and dismiss that charge."

(ALJD P 12, L 16-23).

CAGC argues that the ALJ's strict black letter approach in reading *Johnnie's Poultry* to apply only in situations in which an unfair labor practice complaint has already issued is reversible error. CAGC relies on *Astro Printing Services, Inc.*, 300 NLRB 1028 (1990) for the proposition that an interrogation can still be found coercive

even if conducted before the Board issues a complaint. However, in *Astro Printing,* the respondent employer's attorney questioned employees whether they had provided the Board with affidavits and requested copies. The Board adopted the ALJ's finding that this violated 8(a)(1). The ALJ relied upon *Ingram Farms, Inc.* 258 NLRB 1051, 1055 (1981), another case where the company attorney asked for copies of affidavits provided to the Board. The ALJ in *Ingram Farms* noted that the Board has continued to find improper a request for an employee's affidavit to the NLRB, citing, *Anserphone, Inc.*, 236 NLRB 931,936 (1978). *Astro Printing* simply does not stand for the proposition that the *Johnnie's Poultry* analysis applies to interrogations before the Board issues a complaint.

CAGC's suggestion that the ALJ failed to acknowledge in his analysis that both Walle and Davis were hostile to Powell and that Keys was involved in these proceedings in support of Powell misses the mark. There is no evidence whatsoever that Walle was hostile toward Powell. CAGC's reliance on footnote 45 for such a proposition is misplaced as the ALJ stated there that "[i]t is clear that Walle had a significant problem with Powell's attitude..." Contrary to what CAGC believes, having a problem with one's attitude is not the equivalent of being hostile towards that person. *See e.g. supra, Gateway Equipment Co., Inc.*, 303 NLRB 340, 341 (1991); *Guarantee Savings and Loan*, 274 NLRB 676, 679 (1985); *Bosk Paint and Sandblasting Co.*, 266 NLRB 1033 (1983). Simply put, there is no evidence Walle was hostile towards Powell. Nor was it established on the record that Keys provided an affidavit on behalf of Powell.

The record evidence established that at the advice of the Board Agent, Walle asked Keys a single question about an inconsistency:

Q: [By Robert Drzyzga] How did the conversation start?

A: [By Jacqueline Keys] Mr. Walle asked me why did -- he asked me about the incident, May 11th or whenever it was, why did I tell -- he used initials, why did I tell Labor Relations or something, that management never talked to him, never talked to me.
Q: What Labor Relations was he referring to? Do you know?
A: He used the initials. He said some initials, and then I was like what? And then he repeated himself and he asked that, why did you tell them that management never talked to you? I said, that's not true, and that was it."

(TR 548-549).

As for CAGC's criticism of the ALJ's finding that the question did not involve anything confidential in nature, the record stands unrebutted that Walle's question for Keys was at the suggestion of the Board Agent (TR 130). This is not a situation where a company representative or its attorney interrogated Keys about the unknown contents of her Affidavit or asked for a copy of it.

In circumstances where, as here, employee questioning is brief, non-recurring, and lacking any indicia of restraint or coercion, Board decisions invariably conclude either that "interrogation" has not taken place or that the circumstances were not coercive. In *Milum Textile Servs Co*, 2011 NLRB LEXIS 804 (2011), the Board stated:

> "The General Counsel argues that on June 27 Milum unlawfully interrogated Ruiz when he accused her of passing out union buttons. I have found that Milum did not accuse Ruiz of anything but merely asked her whether her open distribution of a union button in the workplace occurred on worktime. **For a finding of unlawful interrogation, a supervisor's words themselves, or the context in which they are used, must suggest an element of coercion or interference**. Here, Milum apparently accepted Ruiz' denial that she had given out the button on worktime and, although he told her she could not wear the button while working because of safety considerations, he said nothing to dissuade her from distributing buttons. His question could not reasonably have tended to restrain, coerce, or interfere with Ruiz' statutory rights. I shall, therefore, dismiss the complaint allegation that the Respondent unlawfully interrogated employees." *Id* (emphasis supplied)

Similarly, in *Toma Metals*, 342 NLRB 787, 789 (2004), the Board found that where a supervisor approached an employee once on the plant floor, and briefly asked him a question regarding union activity, that questioning was not coercive. In *Promedica Health Systems,* 343 NLRB 1351, 1397 (2004), the Board held that a "singular innocuous conversation" did not constitute unlawful interrogation of an employee. Sixth Circuit precedent has likewise followed this assessment in reviewing Board decisions. In *N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 325 F.2d 360, 364 (6th Cir. 1963) the court stated that "[i]nfrequent, isolated and innocuous inquiries of a relatively small number of employees, standing alone, do not constitute interference, restraint or coercion within the meaning of section 8(a)(1) of the Act."

Questioning or interrogating employees is not per se unlawful under the NLRA. *Monogram Comfort Foods*, 2011 NLRB LEXIS 606 (2011); *NLRB v Homemaker Shops*, 724 F2d 535, 548-549 (6th Cir 1984). "The Board has held that the test of illegality of interrogation is whether, under all circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, 269 NLRB 1176 (1984). Accordingly, CAGC's exception should be overruled.

I. Exceptions 10 through 13

Respondent Employer will not address the arguments made by CAGC in support of Exceptions 10 through 13, and will rely upon Respondent Union's Opposition to same. However, Respondent Employer does wish to point out that CAGC has mistakenly indicated that Tanner admitted she was not threatened by Powell(CAGC Brief at P 34). A review of the transcript clearly establishes that Tanner never testified that she did not feel threatened (TR 1138-1140).

III. CONCLUSION

For all of the reasons set forth above, Respondent Employer respectfully requests that the Administrative Law Judge's findings and conclusions be adopted and affirmed.

PILCHAK COHEN & TICE, P.C.

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Dated: July 15, 2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

CARAVAN KNIGHT FACILITIES MANAGEMENT, LLC

Respondent Employer

and **CASE 07-CA-081195**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 1700

Respondent Unions

and **CASE 07-CB-082391**

ARETHA A. POWELL, an Individual

Charging Party

_____/

PROOF OF SERVICE

I certify that on July 15, 2013, I served a copy of **Respondent, Caravan Knight Facilities Management, Inc's Answering Brief To Acting General Counsel's Exceptions To The Decision Of The Administrative Law Judge** and this **Proof of Service** on:

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via electronic mail and with the National Labor Relations Board efiling system. I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: 7/15/13

Dawn M. Burke